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No. 01-177

Supreme Court, U.S.
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In The Supreme Court of the United States

TERRY COUSIN,

Petitioner,

v.

TRANS UNION CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Trans Union Corporation ("Trans Union" or "TU"), now known as Trans Union LLC, is a Delaware Limited Liability Company which has no non-wholly owned subsidiaries. All of the stock of Trans Union LLC is privately held.

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REASONS FOR DENYING THE WRIT

A. Introduction.

The analysis and standards employed by the Fifth Circuit were consistent with its own precedent, with those of other Circuits, and with those of this Court. The Fifth Circuit's decision to reverse and render is indisputably correct, and no aspect of the case merits review by this Court.

Petitioner's Seventh Amendment claim is utterly baseless. The Fifth Circuit did not engage in impermissible fact finding. Instead, the Court held that, as a matter of law, the properly admitted evidence was insufficient to sustain the verdict and exercised its authority to render judgment.[1] In addition, the supposed conflict among the Circuits wrongly posited by Petitioner on "willfulness" under the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.*, (the "Act" or "FCRA") is nonexistent. Significantly, Petitioner does not allege and cannot establish that the evidence adduced in the District Court would satisfy the willfulness test in any Circuit. Likewise, Petitioner's assertions respecting the malice requirement for defamation claims and the immunity provisions of the Act are erroneous, and raised for the first time in the Petition. Moreover, in the Court of Appeals, Petitioner took a contrary position and conceded that the malice standard applied.

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[1] The Court of Appeals did not reach TU's contention that the punitive damages award was constitutionally excessive. However, such claim would have been subject to *de novo* review. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., -- U.S. --, 121 S.Ct. 1678, 149 L.Ed.2d 674.

Finally, the Fifth Circuit's holding that there was insufficient evidence to support any award of actual damages was entirely proper. Petitioner's alleged emotional distress claims (as the case was actually tried in the District Court) were simply not supported by the evidence. First, there was no proof that Petitioner had been refused credit by Heafner Motors for a car loan as a result of a Trans Union report. This proposition had no basis in reality. In fact, the only credit decision respecting Petitioner was made by GMAC, based on an Equifax report. Second, Petitioner's accusation, that Trans Union had "dredged up" erroneous GMAC information from its archives and maliciously reinserted it into his credit file, was false from the beginning. In the Court of Appeals, Cousin abjured the "dredge up" claim, but only after he was confronted with his contrary specific representations to other courts in litigation against Equifax and GMAC. There, Cousin asserted that GMAC had maliciously re-reported the information to TU and other credit reporting agencies.

Rightly stripped of Petitioner's unproven themes, the Fifth Circuit examined the *de minimus* record on alleged emotional damages and found it to be legally insufficient. In so doing, the Court of Appeals correctly applied principles established by this Court respecting the requirement that a plaintiff must adduce testimony of actual injury to support damages based on emotional distress. In Cousin's case, that necessary evidence was completely lacking.

B. The Judgment of the Fifth Circuit Did Not Violate Either the Seventh Amendment or Fed.R.Civ.P. 50.

1. The Fifth Circuit Did Not Improperly Decide Fact Issues

Cousin's Seventh Amendment argument turns on his meritless claim that the jury was Constitutionally entitled, and the courts are Constitutionally required, to ignore the undisputed and indisputable testimony that Heafner Motors and TU played no role whatsoever in GMAC's decision to refuse credit. The simple truth is that Heafner Motors never denied Mr. Cousin credit.

Petitioner's disingenuous query (p.3) "Was it Heafner Motors, based on a TU report, or GMAC, based on an Equifax report?" flies in the face of the evidence and common sense. The only purpose for which Heafner obtained a Trans Union report was to identify a potential lender, GMAC. GMAC made the only credit decision involved in Mr. Cousin's intended automobile purchase. GMAC acted solely on the basis of its own internal records and a report from Equifax, not Trans Union. GMAC had never even seen the Trans Union report sent to Heafner Motors.

Nothing about the foregoing is out of the ordinary, and Mr. Cousin's transaction was handled in a routine way. Automobile dealers are not credit grantors; they merely submit credit applications to lenders. Cousin's efforts to conjure Heafner Motors into the lender never had any basis in fact and depended on a distortion of various application forms used by Heafner in connection with its processing of the paperwork.

Heafner, like all automobile dealers which arrange (but do not extend) credit, is a Truth in Lending Act ("TILA"), 15 U.S.C. §1601 *et seq.* "creditor" only if the actual lender (here GMAC) grants the credit application and funds the loan. At that juncture, the dealership, at the point of sale, is the entity legally responsible for making the required TILA disclosures to the purchaser. Such TILA disclosures are implicated only after the credit grantor involved has approved the loan. The dealership simply never becomes a TILA "creditor" if the credit grantor turns down the loan application, and the dealership never becomes a credit grantor subject to the FCRA under any circumstances. *See* Riviere v. Banner Chevrolet, Inc., 184 F.3d 457 (5th Cir. 1999). In short, Heafner never became a TILA "creditor" because GMAC denied Petitioner's application. The official Federal Reserve Board staff interpretation cited in Riviere makes the distinction clear:

> The dealer and purchaser execute the contract only after the bank approves the creditworthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.

Riviere, 184 F.3d at 460-1 (emphasis supplied, citation omitted).

This formulation is altogether sensible. TILA and FCRA play different roles in the consumer protection scheme. FCRA focuses on information which affects a consumer's eligibility for credit. TILA, on the other hand, insures that if a loan application is granted, the consumer obtains full disclosure of the true costs of the transaction. GMAC sent Petitioner an

adverse action notice as required by FCRA §1681m, advising him of its denial of the application and identifying Equifax as the consumer reporting agency which supplied the report. TILA was not implicated because the loan was not granted. It was error for the District Judge to admit the TILA documents into evidence and allow Cousin's arguments that the jury could infer from the TILA documents that Heafner Motors denied Cousin's application for credit.

The Fifth Circuit properly recognized this error and did not improperly usurp the jury's role.

2. The Fifth Circuit Was Entitled to Render Judgment for TU.

Cousin erroneously claims that the Fifth Circuit was not entitled under Rule 50 to reverse and render, but was limited to ordering a new trial. This argument cannot be reconciled with this Court's opinion in Weisgram v. Marley Co., 528 U.S. 440, 120 S.Ct. 1101, 145 L.Ed.2d. 958 (2000), which Cousin does not acknowledge in his Petition. In Weisgram, this Court held:

> ...Federal Rule of Civil Procedure 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that evidence was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case. 528 U.S. at 446, 120 S.Ct. at 1116.

Nothing different occurred here.

C. The Fifth Circuit's Holding That, as a Matter of Law, the Record Was Insufficient to Sustain a Willful Violation of the FCRA Is Correct.

A fair reading of the decision of the Court of Appeals on Cousin's FCRA willfulness claim is that well-established principles determined the outcome. Different courts of appeals may use slightly different nomenclature to describe the standard of proof for FCRA willfulness, but this is not evidence of a conflict in the Circuits. In fact, the Fifth Circuit took pains to point out that Cousin's case was insufficient under Fifth Circuit precedent (Stevenson v. TRW, Inc., 987 F.2d 288 (5th Cir. 1993); Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1991)) and those of other Circuits (Philbin v. Trans Union Corp., 101 F.3d 957 (3rd Cir. 1996); Casella v. Equifax Credit Information Systems, 56 F.3d 469 (2nd Cir. 1995), *cert. denied,* 116 S.Ct. 1452, 134 L.Ed.2d 571 (1996)).

In Stevenson, *supra*, plaintiff, a 78-year-old real estate investor, began receiving numerous phone calls from bill collectors regarding accounts that were not his responsibility. Plaintiff submitted a dispute to TRW, which began its investigation, but delayed more than three months before completing it. Even then, TRW failed to delete information, ignored credit grantor responses admitting that certain information was inaccurate, failed to delete entries for which timely responses were not received, and allowed previously deleted inaccurate information to reappear.

As a result of TRW's conduct, Stevenson suffered three credit turn-downs and was forced to make a humiliating visit to his banker to explain his predicament and seek a loan. Nevertheless, the Court rejected Stevenson's §1681n claim and

vacated the award of punitive damages. The Court held that "the record does not reveal, however, any intention to thwart consciously Stevenson's right to have inaccurate information removed promptly from his report." *Id.* at 294.

In Pinner, *supra*, the Court vacated the jury's award of punitive damages. The Court held that the consumer reporting agency had not acted willfully, even though it had failed to investigate adequately and correct inaccurate information. The Court stated:

> In each case where punitive damages have been allowed the defendant's conduct involved willful misrepresentations or concealment.
>
> * * *
>
> [Defendant's] conduct in this case in no way resembles [such] actions.... [Defendant] promptly furnished plaintiff with a copy of his credit report when he requested one. No effort was made to conceal anything....Under the plain language and legislative history of §1681n, punitive damages are appropriate only where the violation has been willful....But here there is simply nothing to even suggest that [defendant] willfully set out to do [plaintiff] harm. There is no evidence that they knowingly and intentionally committed an act in conscious disregard for the rights of others. 805 F.2d at 1263 (citations omitted).

Similarly, in Philbin, *supra*, the Court affirmed the trial court's dismissal of plaintiff's punitive damages claim on summary judgment and held:

> to show willful noncompliance with the FCRA, [a consumer] must show that defendants knowingly and intentionally committed an act in conscious disregard for the rights of others. 101 F.3d at 970.

Philbin involved the reappearance of previously deleted public record information (a tax lien that was in fact Philbin's father's, James Sr., liability). Plaintiff proved that defendant removed the tax lien "for a period of time" after his original dispute. Plaintiff further claimed that, two years later, he notified TU of the reappearance of the tax lien but that TU failed to correct his report. 101 F.3d at 970. The Court, however, held that the claim "falls short of evidence of a willful violation." *Id.*

In Casella, *supra,* the Court held that TU's reporting of information appearing on automated tape, after receiving manual instructions to delete, did not constitute conduct sufficient to establish "willful" misconduct or "conscious disregard." [2]

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[2] *See also*, Lamb v. Equifax Services, Inc., 621 S.W.2d 28, 32 (Ky.Ct.App. 1981), *cert. denied*, 456 U.S. 927, 72 L.Ed. 2d 442, 102 S.Ct. 1973 (1982), where the appellate court vacated the jury's award of $25,000 compensatory and $50,000 punitive damages, because: "The record demonstrates no reluctance on the part of Equifax to disclose to [plaintiff]." *See also*, Guimond v. Trans Union Corporation, N.D.Cal. Docket 92-0301

(continued...)

Absent Petitioner's utterly false and recanted assertion that TU "dredged up"GMAC information, Petitioner's meager proofs pale in comparison to the more extensive proofs judged insufficient in the cited cases. The Fifth Circuit expressly held that Petitioner's grounds for punitive damages failed to meet the definition of willfulness as interpreted by any Circuit:

> The present situation is no more egregious than in *Philbin* or *Casella*. The fact that Trans Union may have had experience with Cousin's BellSouth tradeline and that BellSouth had submitted a UDF to Trans Union about subscription fraud does not necessarily translate into knowingly and intentionally committing an act in conscious disregard of Cousin's rights. BellSouth itself appears to have reinserted the information, and several months had elapsed from the time of the UDF and/or the initial cloaking to the reinsertion of the BellSouth tradeline into Cousin's file. Finally, Trans Union did not conceal Cousin's consumer reports or misrepresent them. That in and of itself suggests that Trans Union did not commit a willful violation of §1681e(b). *Stevenson*, 987 F.2d at 294 ("Only defendants who engaged in 'willful misrepresentations or concealments' have committed a willful

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[2](...continued)
(April 28, 1997) (unpublished opinion), a §1681e(b) action, where the Court held that the reappearance of information in subsequent file disclosures after deletion was insufficient to justify punitive damages.

violation and are subject to punitive damages under §1681n."). 18a.

Petitioner's semantics cannot create a real conflict among the Circuits. Petitioner has failed to demonstrate that a different result would obtain under any other Circuit's interpretation of FCRA willfulness. Petitioner simply did not present evidence to support a willful FCRA violation anywhere.

Cousin's argument on the impact of §1681h(e) on his state law defamation claims is incomprehensible.[3] Setting aside the fact that the state law claim alleged was defamation with malice, this contention is raised for the first time in the Petition, and is inconsistent with the prior express position taken by Cousin in the Court of Appeals that proof of malice was required. 20a.

Defamation with malice requires proof that "defendant acted with knowledge that the statement was false, or with reckless disregard as to its truth or falsity." Gulf Publishing Co. v. Lee, 434 So.2d 687, 695 (Miss. 1983); Brewer v. Memphis Publishing Company, Inc., 626 F.2d 1238, 1247-48 (5th Cir. 1980). Assuming arguendo, that this standard is congruent with FCRA §1681h(e) malice, TU is entitled to judgment as a matter of law because Petitioner failed to present

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[3] FCRA §1681h(e) provides as follows:

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation . . . or negligence, . . . against any consumer reporting agency, . . . except as to false information furnished with malice or willful intent to injure such consumer. (emphasis supplied)

a legally sufficient basis for the jury to find a §1681n, willful, FCRA violation. As the Eighth Circuit held,

> Section 1681h(e) provided a qualified immunity for consumer reporting agencies with an exception from such qualified immunity being made for actions pursuant to sections 1681n and 1681o.... **Such an exception was not meant to lessen the standard necessary to overcome this qualified immunity in defamation actions.** (emphasis in original, **bold** supplied)

Thornton v. Equifax, Inc., 619 F.2d 700, 703 (8th Cir.1980), *cert. denied*, 449 U.S. 835 (1980). *See also*, Bloom v. I.C. Systems, Inc., 972 F.2d 1067, 1069 (2nd Cir. 1992). Moreover, even without regard to the FCRA standard, Petitioner's claim fails under established state law principles. As the Fifth Circuit held in Brewer, *supra*, 626 F.2d at 1259-60,

> Failure to discover misstatements might show negligence but did not show actual malice; even failure to check its own files did not show that the state of mind required for actual malice was "brought home to" those responsible for publishing the [allegedly defamatory statement]. 626 F.2d at 1258, FN26.

See also, Gulf Publishing *supra*; Rhodes v. Ford Motor Credit Company, 951 F.2d 905, 907 (8th Cir. 1991).

In any event, the suggestion that §1681h(e) extends qualified immunity only to required file disclosures effectively reads out part of the section, *i.e.*, that the defamation case is

brought "...with respect to the reporting of information...." (emphasis supplied) Consumer files are not consumer reports as defined by the FCRA. 9a. "Reporting" referenced throughout the FCRA is a communication of information about a consumer to a third party which may affect the consumer's eligibility for credit. The mandatory file disclosure provisions of the FCRA are communications made solely to the consumer involved. Defamation cases require proof of publication to a third party. It would make no sense for Congress to impose a malice requirement to restrict defamation claims, but limit the application of the requirement to communications made to the consumer alone which could not be the basis of a defamation action for want of a third party publication.

D. The Fifth Circuit's Holding That, as a Matter of Law, Cousin Failed to Prove Actual Damages Is Correct.

There was no testimony as to damages connected to TU other than Cousin's awareness, based on a required TU file disclosure to him, that the BellSouth account had reappeared in his credit file. It is clear that no sustainable damage case was proved. The Court of Appeals did nothing more than hold that under those circumstances, more than just a conclusory statement of being very upset or "trapped"is required to prove actual damages. In this connection, the Court of Appeals was well informed by this Court's holding in Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

The Fifth Circuit, relying on Carey, properly rendered judgment on Petitioner's compensatory damages claims on the ground that Petitioner failed to establish proof of actual injury.

The requirement that a plaintiff prove actual injury is consistent with well established principles of law:

> The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty. 435 U.S. at 254-255, 98 S.Ct. at 1048 (internal quotations and citation omitted, emphasis in original).

The Carey Court held that this maxim applied to constitutional claims under 42 U.S.C. §1983 based on violations of procedural due process:

> over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under §1983 as well. 435 U.S. at 257-258, 98 S.Ct. at 1049.

In Memphis Community School District v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986), this Court held that the prerequisites for damages under Carey applied to substantive due process violations as well:

> [Carey] does not establish a two-tiered system of constitutional rights, with substantive rights afforded greater protection than 'mere'

> procedural safeguards. We did acknowledge in Carey that 'the elements and prerequisites for recovery of damages' might vary depending on the interests protected by the constitutional right at issue.... But we emphasized that, whatever the constitutional basis for §1983 liability, such damages must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation.' "

477 U.S. at 309, 106 S.Ct. at 2544 (*quoting* Carey, 435 U.S. at 264-65, 98 S.Ct. at 1052-53) (emphasis in original).

In Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir.1996), *cert. denied,* 519 U.S. 1091, 117 S.Ct. 767, 136 L.Ed.2d 713 (1997), the Fifth Circuit extended the holding in Carey to employment discrimination claims. The Patterson reasoning has been followed. *See, e.g.,* Forshee v. Waterloo Industries, Inc., 178 F.3d 527, 531 (8th Cir. 1999).

Instantly, the Fifth Circuit held that "actual damages" under the FCRA required proof sufficient to meet the test in Carey. This is a natural application of this Court's analyses in Carey and Memphis. The FCRA contains no presumed

damages for a negligent violation[4] and no authority to award nominal damages for a negligent violation.[5]

The totality of Petitioner's testimony on damages consisted of a few vague sentences concerning his awareness, based on an FCRA required disclosure to him of his credit file, that BellSouth had re-reported an erroneous account which TU had previously deleted. As the Court of Appeals correctly noted, Mr. Cousin did not testify about any other disclosure or report. Although Cousin's instant Petition references trial exhibits P42 and P45,[6] not a syllable of testimony appears anywhere in the record respecting P42. As for P45, Mr. Cousin testified only as follows:

> Q. (By Mr. Lewis): Let's go to Exhibit P45. What is the date?
> A. May 12, 1997?
> Q. And do you know to whom this report was sent? Do you remember?
> A. No, I do not. (NT, p.98).

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[4] The FCRA is one of several components of the Consumer Protection Act in Title 15. In the Fair Debt Collection Practices Act, 15 U.S.C. §1691 *et seq.*, (the "FDCPA") the Congress expressly provided for presumed damages for "failure to comply" with the FDCPA. §1691e(b). Clearly, the Congress knew how to include presumed damages in Title 15 and chose not to do so in the FCRA.

[5] *See* Discussion, FN19, 27a-28a.

[6] Petitioner's ultra compressed Statement of the Case required, he asserts, by page limitation constraints, is both inaccurate and misleading. Cousin's inclusion of his lawyer-prepared chronology simply does not comport to the trial record, except insofar as it lists exhibits.

The Fifth Circuit properly rendered judgment in favor of TU because there was insufficient evidence of actual injury caused by a negligent FCRA violation by TU. There was simply no testimony by Petitioner as to damages connected to TU other than his awareness, based on a required TU file disclosure to him, that the BellSouth account had reappeared in his credit file. The Court of Appeals did nothing more than hold that under those circumstances, more than just a conclusory statement of feeling "trapped"is required to prove actual damages.

Cousin's few words of alleged distress which had any connection to TU were conclusory statements based on file disclosures mandated by the FCRA made only to Petitioner at his request. Thus, even without the holding in Carey, Petitioner could establish no entitlement to damages under the FCRA. When a consumer reporting agency makes a required disclosure, §1681g, such disclosure cannot be the basis of a claim under §1681n or §1681o. The essential element of both sections is the failure to comply with a requirement of the FCRA, *i.e.*, the failure to disclose.

Cousin's lawyers understood the difference very well and filed a separate lawsuit against Equifax based on its willful concealment of the BellSouth account. As the Court of Appeals observed, 6a, Equifax failed to disclose Cousin's full file, but rather unlawfully deleted the BellSouth account which Equifax had reported to GMAC a few weeks earlier. As a result, Cousin was unaware that BellSouth had re-reported the account until he received a full and proper disclosure from TU, as required by §1681g. Such compliance by TU cannot be the basis of FCRA liability.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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